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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 343

JOSEPH H. CUDIA and JOHN TURNER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

B. JAY KNIGHT,
ANTHONY S. INGRASSIA,
JOHN R. SNIVELY,
401 West State Street,
Rockford, Illinois,
Counsel for Petitioners.

MIDWEST LAW PRINTING CO., 326 N. MICHIGAN, CHICAGO 60601, FINANCIAL 6-2668

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Joseph H. Cudia and John Turner, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on May 18, 1965.

CITATION TO OPINION BELOW.

The opinion of the Court of Appeals, printed in Appendix B hereto, infra, page 6a, is reported in ..... F. 2d .....

JURISDICTION.

The judgment of the Court of Appeals was entered on May 18, 1965 (Appendix C, infra, page 10a). Rehearing was denied on June 15, 1965 (Appendix D, infra, page 11a). The jurisdiction of this court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED.

1. Whether the indictment states facts sufficient to constitute an offense against the United States.

2. Whether petitioners were entitled to a bill of particulars.

3. Whether the withholding by the government of a complete list of witnesses violated the constitutional rights of petitioners.

4. Whether the motion to suppress evidence acquired by an unreasonable search and seizure should have been granted.

5. Whether petitioners had a fair trial.

STATUTES INVOLVED.

The statutory provisions involved are 18 U. S. C. Section 371, and 26 U. S. C. Sections 5601 and 5602. They are printed in Appendix A hereto, infra, pages 1a-5a.

STATEMENT OF THE CASE.

This is a criminal action.

Petitioners were indicted on October 3, 1963, by the grand jury at Chicago, Illinois, for the offense of conspiracy to commit certain offenses against the United States.

The indictment, consisting of one count, is, as follows:

The September 1963 grand jury charges: That on or about March 7, 1963, and continuing through April 6, 1963, Joseph H. Cudia and John Turner, defendants herein, did, within the Northern District of Illinois, Western Division, unlawfully, knowingly, wilfully and feloniously conspire and combine, confederate and agree together and with each to commit certain offense against the United States, to-wit: have in their possession and custody and under their control an unregistered still and unregistered distilling apparatus set up, in violation of Title 26, Section 5601(a)(1), United States Code; engage in the business of an unregistered distiller, in violation of Title 26, Section 5601(a)(2), United States Code; carry on the business of an unbonded distiller, in violation of Title 26, Section 5601(a)(4), United States Code, make and ferment mash for distillation and production of distilled spirits on unauthorized premises, in violation of Title 26, Section 5601(a)(7), United States Code; produce distilled spirits not as authorized distillers, in violation of Title 26, Section 5601(a)(8), United States Code; attempt to defraud the United States of tax due on distilled spirits while engaging in and carrying on the business of distillers, in violation of Title 26, Section 5602, United States Code.

The grand jury further charges that at or about the time hereinafter set forth, in furtherance of, in the execution of, and for the purpose of carrying into effect the object, design and purpose of the said conspiracy, the defendants hereinafter named, did do and perform the following overt acts:

1. On or about March 7, 1963, Joseph H. Cudia went to 907 S. Main Street, Rockford, Illinois;

2. On or about March 22, 1963, John Turner signed the name "Art Turner" on Receipt No. N 36026 of Skelly Oil Company;

3. On or about March 21, 1963, Joseph H. Cudia went to 907 S. Main Street, Rockford, Illinois;

in violation of Section 371, Title 18, United States Code.

A true bill.

Anna R. Lehmann
Foreman

James P. O'Brien

United States Attorney (R. 5-6.)

Petitioner, Joseph H. Cudia, filed a surety bond in the sum of $1,000 which was approved on October 21, 1963. (R. 8.) He entered a plea of not guilty. (R. 9.)

Entry of appearance of John R. Snively as attorney for petitioner, John Turner, was filed on October 22, 1963. (R. 11.) He entered a plea of not guilty. (R. 13.)

Petitioner, John Turner, filed on October 22, 1963, a motion to dismiss the indictment. (R. 12.) It was heard and denied. (R. 13.)

Entry of appearance of B. Jay Knight as attorney for petitioner, Joseph H. Cudia, was filed on October 30, 1963. (R. 16.)

His motion to dismiss the indictment was heard and denied. (R. 19.)

Petitioner, John Turner, filed on October 30, 1963, a motion for discovery and inspection. (R. 17.)

He also filed a motion for a bill of particulars. (R. 18.)

His motion is, as follows:

The defendant, John Turner, moves the court to direct the filing of a bill of particulars as follows:

1. The names of all parties to the alleged conspiracy.

2. The dates and places of the alleged conspiracy.

3. The acts and declarations of the parties in furtherance of the alleged conspiracy.

An answer to the motion for bill of particulars was filed by the government on November 13, 1963. (R. 25-29.)

Petitioner, John Turner, filed on November 29, 1963, a motion for a complete list of witnesses. (R. 30.)

The motion for bill of particulars was heard and denied on November 29, 1963. (R. 31.) The motion for complete list of witnesses was also heard and denied.

Leave was given petitioner, John Turner, to file a surety bond to replace his cash bond. (R. 31.) A surety bond was filed. (R. 32.)

Petitioner, John Turner, filed on July 6, 1964, a motion to dismiss the indictment. (R. 34.) It was the same as his former motion.

He also filed a motion to suppress evidence. (R. 35.)

His motion is, as follows:

The defendant, John Turner, moves the court to direct that certain property, consisting of 1000 gallons of mash in 20 50-gallon drums, 30 gallons of the finished product, 100 pounds of wheat, 100 pounds of sugar, 2 20-gallon crocks, 1 cooker for cooking mash, 1 55-gallon cooler drum, and about 100 empty gallon jugs, which was unlawfully seized and taken from a certain building on Cunningham Road near Pierpont Avenue at Rockford, Illinois, by Mike Iasparro, Joe Mandell, Eugene Ebens, and Eugene Graham, Deputy Sheriffs of Winnebago County, in the early morning of April 6, 1963, and all testimony relative thereto, and any photographs thereof, be suppressed as evidence against him.

He states that the property was seized without a search warrant.

The motion to dismiss the indictment was denied on July 13, 1964. (R. 36.) The motion to suppress evidence was ordered to be considered with the evidence during the course of the trial.

The trial was held before the Honorable J. Sam Perry, Judge, and a jury, on July 13, 14, 15, 16 and 17, 1964.

The motion of petitioner, John Turner, to suppress evidence was renewed and denied on July 14, 1964. (R. 37.)

In the order named, Charles Richard Meehan, Carl B. Hambach, Burton W. Rehn, Eugene L. Ebens, Mike Isaparro, Walter Yates, Robert A. Woodruff, Wilbur L. Tucker, Edwin Norman Schaye, Roy Schroeder, Jim Warring, Willie Fredd, Mary E. Myers, Donald Anderson, Donald Vaughn, Robert James Dytrych, and Howard C. Doulder, testified for the prosecution.

Motions of petitioners, at the close of respondent's case, for judgment of acquittal were filed, heard and denied on July 15, 1964. (R. 40.)

In the order named, Rev. John Tigner, Lloyd Clark, Floyd Campbell, Joseph Howard Cudia, Anne Martegani, and Edna Cudia, testified for petitioner, Joseph H. Cudia.

The prosecution introduced evidence in rebuttal.

In the order named, Patrick Huffman, Carl B. Hambach, and Robert J. Dytrych, testified.

Motions by petitioners, at the close of all the evidence, for judgment of acquittal were filed, heard and denied on July 16, 1964. (R. 43.)

The jury returned separate verdicts of guilty on July 17, 1964. (R. 45-46.)

The cause was continued to July 20, 1964, for disposition.

The District Court imposed sentence on July 20, 1964. (R. 47-48.)

Petitioners were committed to the custody of the Attorney General for a period of five years, to serve the first six months and be placed on probation for the remainder of the five year term. Fines of $1,000 and costs were imposed, to be paid under the supervision of the probation officer. The bonds were ordered to stand as appeal bonds. Leave was given to petitioners to file motions for new trial within 10 days.

Judgment and commitment orders, and judgment and orders for probation, were entered on July 20, 1964. (R. 57-60.)

Petitioner, John Turner, filed on July 27, 1964, a motion for new trial, or in the alternative, judgment of acquittal. (R. 61-64.)

Petitioner, Joseph H. Cudia, filed on July 27, 1964, a motion for new trial. (R. 65-67.)

The motions were denied on July 28, 1964. (R. 68-69.)

Notice of appeal was filed by petitioners on August 6, 1964. (R. 71-73.)

Leave was given by the court below to dispense with the printing of the appendix on November 25, 1964.

FACTS.

In the early morning of April 6, 1963, a building on Cunningham Road, near South Pierpont Avenue, Rockford, Illinois, was searched by Winnebago County Officers without a warrant. (R. 207-212.) In the building was discovered a still, mash, liquid, a cooler, sugar, crocks and glass jugs which were seized. The still was still warm. (R. 215.) The building had been under surveillance. (R. 208.)

The property was owned by Joseph H. Cudia, but he had rented the building to Scott Dullard, of Chicago, Illinois. (R. 210.) Mr. Cudia had purchased from Mott Bros. Co., of Rockford, Illinois, certain asbestos cement and copper tubing and fittings which were to be used at

his home and elsewhere, but they were not used in the building where the still was discovered. (R. 665-668.) Floyd Campbell used the asbestos to repair the furnace in his home. (R. 581-588.) The copper tubing and fittings were introduced in evidence by him.

It was charged that John Turner signed the name, Art Turner, to a certain receipt of Skelly Oil Company for a 500-gallon gas tank which was delivered to the building by Roy Schroeder (R. 315), but the person that signed the receipt did not accompany him there. (R. 334.) He was not sure of the identity of the person that signed the receipt. (R. 335.)

Howard C. Doulder, an examiner of questioned documents (R. 487), but employed by the government, testified that he made an examination and comparison of the questioned signature "Art Turner" with the known handwriting of John Turner and it was his opinion that they are the handwriting of one and the same person. (R. 507.)

Mr. Cudia testified that he did not conspire with Mr. Turner to commit any offense against the United States. (R. 686.) He also testified that he had not requested or solicited him to obtain a 500-gallon gas tank. He knew nothing about it. (R. 687.)

REASONS FOR GRANTING THE WRIT.

1. The petitioners were denied their constitutional right to be informed of the nature and cause of the accusation.

In all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation. (U. S. C. A. Const. Amend. 6.)

The indictment or information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. (Fed. Rules of Crim. Proc. Rule 7 (c), 18 U. S. C. A.)

The statute creating the offense alleged in the indictment is, as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."
>
> 18 U. S. C. A. Sec. 371.

Clearly, it is not sufficient to allege the offense in the language of the statute. While the offense to be punished may be set forth with sufficient definiteness and certainty in the statute to satisfy constitutional requirements, it does not follow that an indictment in the language of the statute is sufficient to inform the accused of the nature and cause of the accusation, or to state an offense punishable under the statute, as required by the Constitution. Rather, where the statute does not define or describe the act or acts constituting the offense

created, they must be specifically alleged. Facts and not conclusions must be alleged. (Fed. Rules of Crim. Proc. Rule 7 (c), 18 U. S. C. A.) Here, the facts are lacking. The indictment should have set forth the nature and elements of the offense charged. It should also have stated the time and place of the offense as definitely as can be done.

Taking up the overt acts alleged in the indictment, we discover that they are vague, indefinite and uncertain. They do not disclose any facts showing any connection between the overt acts and the object of the conspiracy. It is true, as the court said in *Yates* v. *United States,* 354 U. S. 298, 334:

> "* * * It is not necessary that an overt act be the substantive crime charged in the indictment as the object of the conspiracy. *Pierce* v. *United States,* 252 U. S. 239, 244; *United States* v. *Rabinowich,* 238 U. S. 78, 86. Nor, indeed, need such an act, taken by itself, even be criminal in character. *Braverman* v. *United States,* 317 U. S. 49. The function of the overt act in a conspiracy prosecution is simply to manifest 'that the conspiracy is at work,' ***."

The connection, however, must be made to appear specifically. (See *United States* v. *Kensil,* 295 F. 2d 489.)

In the consideration thereof, we have made a diligent search but we have not found a case which is squarely in point one way or the other. Perhaps one reason for the inability to find such a case is that it appears from the decisions that throughout the years draftsmen of indictments have made it a practice to allege the facts in greater detail. It should be kept in mind in this connection that an accused is presumed to be innocent until proven guilty, and that an indictment must be tested upon a presumption that the accused had no knowledge

of the facts charged against him. (*White* v. *United States*, 10 Cir., 67 F. 2d 71.) It is also significant that the government has not cited a single case which is in point.

The indictment is the most defective that appears in the reported cases. Clearly, it is void. The motion to dismiss the indictment should have been allowed.

There was a denial of due process of law.

2. To prepare the defense, a bill of particulars was required.

It is believed that the record shows that petitioners were taken by surprise at the trial and that their substantial rights were prejudiced by the lack of a bill of particulars. If it does not, it should.

In *United States* v. *Smith*, 16 F. R. D. 372, 374, District Judge Charles E. Whitaker, later a member of this court, said:

> "Certainly the fact that an indictment or information conforms to the simple form suggested in the rules is no answer or defense to a motion for a bill of particulars under Rule 7 (f). Rule 7 (f) necessarily presupposes an indictment or information good against a motion to quash or a demurrer. Its proper office 'is to furnish to the defendant further information respecting the charge stated in the indictment when necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial', and when necessary for those purposes, is to be granted even though it requires 'the furnishing of information which in other circumstances would not be because evidentiary in nature', and an accused is entitled to this 'as of right'. *U. S.* v. *U. S. Gypsum*, D. C., 37 F. Supp. 398, 402. To the same effect are *Singer* v. *U. S.*, 3 Cir., 58 F. 2d 74, *U. S.* v. *Allied*

Chemical & Dye Corp., D. C. 42 F. Supp. 425, 428; *Fontana* v. *U. S.*, 8 Cir., 262 F. 283. It seems quite clear that where charges of an indictment are so general that they do not sufficiently advise defendant of the specific acts with which he is charged, a bill of particulars should be ordered.' Cases cited and *U. S.* v. *Grosman*, D. C., 55 F. 2d 408; *Chew* v. *U. S.*, 8 Cir., 9 F. 2d 348, 353.

"This must necessarily be true when we realize that there is no discovery means in criminal cases, such as provided by the civil rules for civil cases, and that the only means open to a defendant, in a criminal case, for the securing of the details of the charge against him is that afforded by Rule 7 (f) of the Federal Rules of Criminal Procedure. 'Bills of particulars have grown from very small and technical beginnings into most important instruments of justice. * * * While they are not intended to advise a party of his adversary's evidence or theory, they will be required, even if that is the effect, in cases where justice necessitates it.'" *U. S.* v. *Balaban*, D. C., 26 F. Supp. 491, 499.

"Nor is it any answer to a motion for a bill of particulars for the government to say: 'The defendant knows what he did, and, therefore, has all the information necessary.' This argument could be valid only if the defendant be presumed to be guilty. For only if he is presumed guilty could he know the facts and details of the crime. Instead of being presumed guilty, he is presumed to be innocent. Being presumed to be innocent, it must be assumed 'that he is ignorant of the facts on which the pleader founds his charges'. *Fontana* v. *U. S.*, 8 Cir., 262 F. 283, 286; *U. S.* v. *Allied Chemical & Dye Corp.*, D. C. 42 F. Supp. 425. This conclusion seems to me to be elementary, fundamental and inescapable."

Here, the indictment is vague, indefinite and uncertain. Petitioner, John Turner, moved the court to direct the

filing of a bill of particulars showing (1) the names of all parties to the alleged conspiracy, (2) the dates and places of the alleged conspiracy, and (3) the acts and declarations of the parties in furtherance of the alleged conspiracy.

The information sought was not within the knowledge of petitioners. They did not have an equal opportunity with the prosecution to discover the information. The information is not evident from an examination of the accusation as a whole. The information is not as to matters sufficiently described in the indictment. The information is not as to immaterial or irrelevant matters. It was indeed a reasonable request for information.

A bill of particulars was necessary to inform the accused of the nature and cause of the accusation, to avoid surprise, to enable them to prepare for trial, and to safeguard them from a subsequent prosecution for the same act or offense. (*Remmer* v. *United States,* C. A. Nev., 295 F. 2d 277, vacated on other grounds, 347 U. S. 227, 98 L. ed. 654, 74 S. Ct. 450, rehearing granted and remanded 348 U. S. 904, 99 L. ed. 710, 75 S. Ct. 288, affirmed 222 F. 2d 720.)

Clearly, good cause was shown. It was an arbitary abuse of discretion for the District Court to deny the motion.

Again, there was a denial of due process of law.

3. Justice required that the accused be furnished with a complete list of witnesses.

In Illinois, it has long been the practice in the state courts to require the State to furnish the accused with a complete list of witnesses. The new Code of Criminal Procedure of 1963 provides that on motion of the de-

fendant the court shall order the State to furnish the defense with a list of prosecution witnesses and their last known addresses. (Ill. Rev. Stat. 1963, Chap. 38, Sec. 114-9.)

The Federal Rules of Criminal Procedure make no provision for a similar motion. The District Court, however make no provision for a similar motion. The District Court, however, has inherent power to require the government to furnish the accused with a complete list of witnesses. It should have done so. (Here, there were 18 witnesses that testified for the prosecution.)

In *Brady* v. *Maryland,* 373 U. S. 83, 10 L. ed. 2d 215, 83 S. Ct. 1194, 1197, the court said:

> "The principle of *Mooney* v. *Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the Court of Appeals. 226 Md. at 427, 174 A. 2d, at 169."

The suppression or withholding by the government of evidence favorable to an accused, or a complete list of

witnesses on request, as in this case, violates the Due Process Clause of the 14th Amendment to the Constitution of the United States. (*Brady* v. *Maryland, supra, Jencks* v. *United States,* 353 U. S. 657, 1 L. ed. 2d 1103, 77 S. Ct. 1007.)

Again, there was a denial of due process of law.

4. Evidence acquired by an unreasonable search and seizure is not admissible.

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (U. S. C. A. Const. Amend. 4.)

"* * * nor shall (any person) be compelled in any criminal cases to be a witness against himself, nor be deprived of life, liberty or property, without due process of law * * *." (U. S. C. A. Const. Amend. 5.)

Here, a search and seizure was made without a warrant. A timely motion to suppress the evidence was made by petitioner, John Turner. The motion was ordered to be considered with the evidence during the course of the trial.

At the trial, certain property so seized without a warrant was introduced by the prosecution, together with testimony relative thereto, and photographs thereof. The motion was renewed, but it was denied.

Petitioner did not claim ownership or possession of the premises searched or property seized. Where a showing of interest in seized property would also convict,

there is no necessity to show an interest in the premises searched or the property seized. (*Elkins* v. *United States,* 364 U. S. 206, 4 L. ed. 2d 1669, 80 S. Ct. 1437, *Rios* v. *United States,* 364 U. S. 253, 4 L. ed. 2d 1688, 80 S. Ct. 1431.)

In its opinion, the court below said:

> "We think our holding in *United States* v. *Sferas,* 210 F. 2d 69, 74 (1954) is persuasive, where we said:
>
> '* * * where two persons have equal rights to the use or occupation of the premises, either may give consent to a search, and the evidence thus disclosed can be used against either. * * *' "

The holding may be persuasive, but it is not applicable to the instant case. There is absolutely no testimony showing that petitioners had equal rights to the use or occupation of the premises.

A waiver or consent must be proved by clear and convincing testimony. It must be established that there was no duress or coercion, actual or implied. The government must show a consent that is unequivocal and specific, and freely and intelligently given. (*Judd* v. *United States,* 190 F. 2d 649.)

Where one in custody peacefully submits to the demands of an officer to break the lock on a building, it is not a waiver of his constitutional rights. (*United States* v. *Slusser,* D. C. 270 F. 2d 816.)

Petitioner, Joseph H. Cudia, may have acquiesced in the search that was made of the premises, but this is not sufficient. (*United States* v. *Lantrip,* D. C. 74 F. Supp. 946.) He must consent to the same, but he did not do so. Although he was the landlord, he had no right to break into the premises occupied by his tenant. Likewise, he

had no right to consent to a search of the premises by the officers, or to authorize them to search the premises.

Clearly, the rights of petitioners against unreasonable search and seizure were violated. They were compelled to be witnesses against themselves. They were also deprived of their liberty without due process of law.

Evidence so acquired should be suppressed. (*Johnson* v. *United States,* 333 U. S. 10, 92 L. ed. 436, 68 S. Ct. 367.) The District Court erred in denying the motion to suppress evidence.

Again, there was a denial of due process of law.

5. There is no proof of a conspiracy or that petitioners are the persons who committed the offense, and the verdicts are not supported by substantial evidence.

In order to establish the offense of conspiracy charged in the indictment, the evidence must show beyond a reasonable doubt:

First, that the conspiracy described was formed and existed at or about the time alleged.

Second, that the accused knowingly and wilfully became a member of the conspiracy.

Third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time alleged.

Fourth, that such overt act, if any, was committed in furtherance of some object or purpose of the conspiracy as charged.

Here, leave was granted by the court below to dispense with the printing of the appendix. Although the transcript of proceedings is voluminous, little more than a

suspicion of guilt is raised by the evidence. It is not clear and convincing. Likewise, it is conflicting as well as weak and unsatisfactory.

The record shows that the prosecution failed to establish the offense of conspiracy charged in the indictment.

It also leaves a reasonable and well founded doubt that petitioners are the persons who committed the offense.

No testimony was introduced by the prosecution to show that petitioners conspired together to commit any offense against the United States. Petitioners were not shown to have at the time or place where, and at the time when, a still and distilling apparatus was set up without being registered, or the business of a distiller was engaged in or carried on, or where mash and ferment mash fit for distillation and the production of distilled spirits, was made, or such distilled spirits produced.

Petitioner, Joseph H. Cudia, was taken from his home by the officers to the site or place where a still or distilling apparatus was set up without being registered and had been in operation. He was then arrested. He was interrogated by the officers. An incriminating statement was elicited from him by them during accusatory interrogation. (R. 224.) He was not advised of his right to counsel or his right to remain silent. (*Escobedo* v. *Illinois,* 378 U. S. 478, 12 L. ed. 2d 977, 84 S. Ct. 1758, *Massiah* v. *United States,* 377 U. S. 201, 12 L. ed. 2d 246, 84 S. Ct. 1199.) He was charged with the operation of a still in a state court, but he was found not guilty. (R. 622-626.) He objected to the admission of the incriminating statement in the District Court, but it was admitted.

Petitioner, John Turner, was not arrested for any offense until he was indicted with petitioner, Joseph H. Cudia, for the offense of conspiracy.

Although the site or place had been under surveillance by the officers, there is absolutely no testimony that petitioners had been there.

A verdict cannot be permitted to stand where, as in this case, there exists a reasonable and well founded doubt of the guilt of petitioners.

Clearly, the want of evidence is fatal to the verdicts. A new trial should have been granted to petitioners because it was required in the interests of justice.

Again, there was a denial of due process of law.

Conclusion.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

B. Jay Knight,
Anthony S. Ingrassia,
John R. Snively,
Counsel for Petitioners.

APPENDIX

A.

Statutes

§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U. S. C. A. Sec. 371.

§ 5601. Criminal penalties.

(a) Offenses. Criminal penalties.

(1) Unregistered stills.—has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a); or

(2) Failure of distiller or rectifier to file application.—engages in the business of a distiller or rectifier without having filed application for and received notice of registration, as required by section 5171(a); or

(3) False or fraudulent application.—engages, or intends to engage, in the business of distiller, bonded

warehouseman, rectifier, or bottler of distilled spirits, and files a false or fraudulent application under section 5171; or

(4) Failure or refusal of distiller or rectifier to give bond.—carries on the business of a distiller or rectifier without having given bond as required by law; or

(5) False, forged, or fraudulent bond.—engages, or intends to engage, in the business or distiller, bonded warehouseman, rectifier, or bottler of distilled spirits, and gives any false, forged, or fraudulent bond, under subchapter B; or

(6) Distilling on prohibited premises.—uses, or possesses with intent to use, any still, boiler, or other utensil for the purpose of producing distilled spirits, or aids or assists therein, or causes or procures the same to be done, in any dwelling house, or in any shed, yard, or inclosure connected with such dwelling house (except as authorized under section 5178(a)(1)(C), or on board any vessel or boat, or on any premises where beer or wine is made or produced, or where liquors of any description are retailed, or on premises where any other business is carried on (except when authorized under section 5178(b); or

(7) Unlawful production, removal, or use of material fit for production of distilled spirits.—except as otherwise provided in this chapter, makes or ferments mash, wort, or wash, fit for distillation or for the production of distilled spirits, in any building or on any premises other than the designated premises of a distilled spirits plant lawfully qualifed to produce distilled spirits, or removes, without authorization by the Secretary or his delegate, any mash, wort, or wash, so made or fermented, from the designated premises of such lawfully qualified plant before being distilled; or

(8) Unlawful production of distilled spirits.—not being a distiller authorized by law to produce distilled

spirits, produces distilled spirits by distillation or any other process from any mash, wort, wash, or other material; or

(9) Unauthorized use of distilled spirits in manufacturing processes.—except as otherwise provided in this chapter, uses distilled spirits in any process of manufacture unless such spirits—

(A) have been produced in the United States by a distiller authorized by law to produce distilled spirits and withdrawn in compliance with law; or

(B) have been imported (or otherwise brought into the United States) and withdrawn in compliance with law; or

(10) Unlawful rectifying or bottling.—engages in or carries on the business of a rectifier, or a bottler of distilled spirits—

(A) with intent to defraud the United States of any tax on distilled spirits rectified or bottled by him; or

(B) with intent to aid, abet, or assist any person or persons in defrauding the United States of the tax on any distilled spirits; or

(11) Unlawful purchase, receipt, rectification, or bottling of distilled spirits.—purchases, receives, rectifies, or bottles any distilled spirits, knowing or having reasonable grounds to believe any tax due on such spirits has not been paid or determined as required by law; or

(12) Unlawful removal or concealment of distilled spirits.—removes, other than as authorized by law, any distilled spirits on which the tax has not been paid or determined, from the place of manufacture or storage, or from any instrument of transportation, or conceals spirits so removed; or

(13) Creation of fictitious proof.—adds, or causes to be added any ingredient or substance (other than ingredients or substances authorized by law to be

added) to any distilled spirits before the tax is paid thereon, or determined as provided by law, for the purpose of creating fictitious proof; or

(14) Distilling after notice of suspension.—after the time fixed in the notice given under section 5221-(a) to suspend operations as a distiller, carries on the business of a distiller on the premises covered by the notice of suspension, or has mash, wort, or beer on such premises, or on any premises connected therewith, or has in his possession or under his control any mash, wort, or beer, with intent to distill the same on such premises;

shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

(b) Presumptions.—

(1) Unregistered stills.—Whenever on trial for violation of subsection (a) (1) the defendant is shown to have been at the site of place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

(2) Failure or refusal of distiller or rectifier to give bond.—Whenever on trial for violation of subsection (a) (4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

(3) Unlawful production, removal, or use of material fit for production of distilled spirits.—Whenever on trial for violation of subsection (2) (7) the

defendant is shown to have been at the place in the building or on the premises where such mash, wort, or wash fit for distillation or the production of distilled spirits, was made or fermented, and at the time such mash, wort, or wash was there possessed, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

(4) Unlawful production of distilled spirits.— Whenever on trial for violation of subsection (a) (8) the defendant is shown to have been at the site or place where, and at the time when, such distilled spirits were produced by distillation or any other process from mash, wort, wash, or other material, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

Added Pub. L. 85-859, Title II, Sec. 201, Sept. 2, 1958, 72 Stat. 1398.

§ 5602. Penalty for tax fraud by distiller.

Whenever any person engaged in or carrying on the business of a distiller defrauds, attempts to defraud, or engages in such business with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, he shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. No discontinuance or nolle prosequi of any prosecution under this section shall be allowed without the permission in writing of the Attorney General. Added Pub. L. 85-859. Title II, Sec. 201, Sept. 2, 1958, 72 Stat. 1400.

26 U. S. C. A. Secs. 5601, 5602.

B.

Opinion

In the

United States Court of Appeals

For the Seventh Circuit

No. 14857 SEPTEMBER TERM, 1964 APRIL SESSION, 1965

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH H. CUDIA and
JOHN TURNER,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.

MAY 18, 1965

Before SCHNACKENBERG, KILEY and SWYGERT, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Joseph H. Cudia and John Turner, defendants, appeal from their respective convictions by separate judgments entered on verdicts of a jury. They were tried upon an indictment charging a conspiracy, under 18 U.S.C.A. § 371, to have in their possession, custody and control an unregistered still, in violation of 26 U.S.C.A. § 5601 (a) (1) (2) (4) (7) and (8) and § 5602, and alleging two overt acts by Cudia and one overt act by Turner in the execution of the conspiracy.

1. Defendants assign as error the action of the district court in denying their motions to dismiss the indictment. They urge that the overt acts alleged are vague, indefinite and uncertain, under 18 U.S.C.A. rule 7 (c), and violate the sixth amendment of the federal constitution.

The government, while assuming for the sake of argument on this point that the second overt act (that by Turner) is insufficient to specify a jurisdictional location, insists that the remaining two acts are specific as to time

and place, under the authority of *De Lacey* v. *United States*, 9 Cir., 249 F. 625, 628 (1918). In *Yates* v. *United States*, 354 U.S. 298, 334, the court said:

> "* * * It is not necessary that an overt act be the substantive crime charged in the indictment as the object of the conspiracy. *Pierce* v. *United States*, 252 U.S. 239, 244; *United States* v. *Rabinowich*, 238 U.S. 78, 86. Nor, indeed, need such an act, taken by itself, even be criminal in character. *Braverman* v. *United States*, 317 U.S. 49. The function of the overt act in a conspiracy prosecution is simply to manifest 'that the conspiracy is at work,' * * *."[1]

We agree with the government's contention and we find no error in this respect.

2. Defendants claim error in the district court's denial of Turner's motion for a bill of particulars. However, such a motion is addressed to the sound discretion of the court. *United States* v. *Ansani*, 240 F. 2d 216 (1957), cert. den. *sub nom Milner* v. *United States*, 353 U.S. 936. In *Wong Tai* v. *United States*, 273 U.S. 77, the court said, at 82:

> "* * * And there is nothing in the record indicating that the defendant was taken by surprise in the progress of the trial, or that his substantial rights were prejudiced in any way by the refusal to require the bill of particulars. See *Connors* v. *United States*, 158 U.S. 408, 411; *Armour Packing Co.* v. *United States*, 209 U.S. 56, 84; *New York Central R. R.* v. *United States*, 212 U.S. 481, 497."

The indictment in the case at bar alleges the period of the conspiracy to be from March 7, 1963 to April 6, 1963 and the dates of the overt acts are within that general period. The record fails to show that defendants were taken by surprise at the trial or that their substantial rights were prejudiced in any way by the lack of a bill of particulars.

3. In their brief, appellants contend that the trial court erred in denying defendant Turner's motion for a complete list of witnesses. They rely on *Jencks* v. *United States*, 353 U.S. 657. However, we do not believe *Jencks*

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[1] A helpful collection of authorities is found in United States v. Gilboy, D.C. M.D. Pa., 160 F. Supp. 442 (1958).

is applicable to that contention. There is no showing that the government had a list of witnesses or that a situation arose to which the decision in *Jencks* would apply.

4. Defendant Turner filed a motion to suppress as evidence 1000 gallons of mash and certain products and material claimed to have been unlawfully seized without a search warrant, in violation of the fourth and fifth amendments to the federal constitution. Some of this evidence was introduced by the government at the trial, together with testimony relating thereto and photographs thereof. Thereupon the motion was renewed and denied.

However the government calls our attention to evidence in the record that Ebens, a government witness, who was a detective for the Winnebago County sheriff's office, testified that he and detective Graham saw a large gas tank sitting outside a building and that as they got close to the building they could smell mash. The detectives went to Cudia's house and picked him up. Cudia later that day told them he owned the building and rented it to a man known to him as Scott Dullard. Thereupon they went to the building in question and, when asked if he had a key, Cudia answered in the negative, that the rent had not been paid for the month of April and that the detectives should break the lock on the building. Cudia and two other detectives entered the building, where it was very warm and the smell of mash was very strong. Cudia went ahead and turned on the lights in the building. The men entered the basement and in front of them were 20 barrels of mash, a cooker, a cooler, sugar and crocks. Cudia then was placed under arrest and later he made and signed a written statement.

While in this court the argument that the trial court erred in denying a motion to suppress evidence appears in a brief filed by the attorneys for Turner as well as Cudia, it is clear that Cudia cannot assert this claim inasmuch as he authorized the detectives to break the lock and enter the premises where the illegal still was in operation. As to the objection of Turner to the failure of the trial court to suppress the evidence, we hold that his motion to suppress was properly denied by the district court. Certainly all searches without a warrant are not illegal.

Brinegar v. *United States,* 338 U.S. 160 (1949). The observation of gas tanks near the building housing the still and the detection of the odor of mash emanating from the building, followed by the disclaimer to the officers by the owner of an immediate possessory interest in the premises and the assertion of the landlord's right of re-entry amounted to an authorization to the officers to enter the building. We think our holding in *United States* v. *Sferas,* 210 F. 2d 69, 74 (1954) is persuasive, where we said:

> "* * * where two persons have equal rights to the use or occupation of premises, either may give consent to a search, and the evidence thus disclosed can be used against either. * * *"

5. In a general attack upon the facts revealed by the evidence in this case, defendants charge that there is no proof of conspiracy or of their identity as the persons charged, and that the verdicts are not supported by substantial evidence. Despite the lack of an appendix as provided by our rule 16, we have referred to the voluminous transcript of proceedings and find that there is such proof and evidence.

On this appeal, the evidence is to be viewed in a light most favorable to the government. *United States* v. *Micele,* 7 Cir., 327 F. 2d 222, 224 (1964). So viewed, the evidence was sufficient to support the verdicts of the jury.

No formal agreement is necessary to constitute a conspiracy; such an agreement may be inferred from the facts appearing in the evidence. A common design is the essence of conspiracy. *United States* v. *Zuideveld,* 7 Cir., 316 F. 2d 873, 878 (1963), cert. den. 376 U.S. 916.

6. We believe that the district court properly submitted to the jury two forms of verdicts as to Cudia and two as to Turner. As to each defendant there was a form finding him guilty and a form finding him not guilty. The jury signed the form as to each defendant which read "We, the jury, find defendant [here the name of a defendant was entered] guilty". There was no error here.

For these reasons the judgments from which this appeal was taken are affirmed.

JUDGMENTS AFFIRMED.

C.

Judgment

In the United States Court of Appeals For the Seventh Circuit

Chicago, Illinois 60610

Tuesday, May 18, 1965

Before

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 14857 v.

JOSEPH H. CUDIA and
JOHN TURNER,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Western Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

D.

Order Denying Petition for Rehearing

In the United States Court of Appeals For the Seventh Circuit

Chicago, Illinois 60610

Tuesday, June 15, 1965

Before

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee

No. 14857 v.

JOSEPH H. CUDIA and
JOHN TURNER,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for rehearing, filed by appellants herein, be, and the same is hereby DENIED.